NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

MICHAEL A. FITZ, JAMES R. FITZ and HOWARD B. FITZ, JR.,

Plaintiffs/Appellees,

vs.

RED STONE RESOURCES, LLC,

Defendant/Appellant.

Case No. 120,889
(Consolidated with
Case No. 120,896

APPEAL FROM THE DISTRICT COURT OF
COAL COUNTY, OKLAHOMA

HONORABLE PAULA INGE, DISTRICT JUDGE

VACATED AND REMANDED

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For Defendant/Appellant

OPINION BY GREGORY C. BLACKWELL, PRESIDING JUDGE:

Red Stone Resources, LLC, appeals the judgment of the district court that the company was contractually required to purchase certain mineral interests from plaintiffs Michael A. Fitz, James R. Fitz, and Howard B. Fitz, Jr. The Fitzes counter-appeal the court's decision that Red Stone was not required to purchase additional mineral interests included in the same contract. On review, we reject

each of Red Stone's legal arguments but hold that the judgment entered in favor of the Fitzes was premature on this record. As such, the judgment appealed is vacated, and the matter is remanded for further proceedings consistent with this opinion.

I.

This matter begins when Red Stone attempted to purchase certain mineral interests located in Coal County. At this time, both Red Stone and the Fitzes believed that each Fitz brother owned a one-third share of 65.62422 acres of minerals in Section 24-1N-10E. In June 2018, the Fitzes signed three identical purchase agreements, each agreeing to sell 21.87474 acres. As the matter turns largely on an interpretation of the purchase agreement, we will reproduce it below.

PURCHASE & SALE AGREEMENT FOR MINERALS

> THIS AGREEMENT, Made and entered into this 5th day of June, 2018 between [INDIVIDUAL FITZ PLAINTIFF] hereinafter called "Seller" whether one or more and **Red Stone Resources LLC** or associated corporate entities, hereinafter called "Buyer";
>
> WITNESSETH, That for and in consideration of the conditions herein set forth and payments to be and truly made as herein specified, Seller hereby maintains an active executed Purchase and Sale Agreement with the underlying mineral owners and agrees to convey unto Buyer, by good and sufficient Mineral Deed, the following described mineral rights located in **Coal County Oklahoma.**
>
> **All Right Title and Interest**
> Section 24-1N-10E ($4,000.00 per verifiable net mineral acre)
>
> Buyer agrees to pay for said mineral rights the sum of **$87,498.96** (for 21.87474 verifiable net mineral acres, to be determined upon verification of title) which represents the total selling price, upon receipt of properly executed Mineral Deeds covering Sellers interest in the subject properties.

The Buyer shall have thirty ("30") business days from the acceptance of this agreement to:

1. Examine the title to the subject property and prepare abstracts (at Buyers expense) if required,
2. Furnish objections in writing of title defects to Seller or their agent,
3. Seller agrees to provide any known documentation available, or if in their possession, provide a copy to Buyer, to help in curing title defects.
4. Correct any title defects unless more time is needed to perform curative and Buyer shall notify Seller in writing.
5. If the minerals are leased they will have at least a **3/16ths** royalty or the purchase price will be reduced by 1/3rd (one-third).

The title shall be conveyed by Mineral Deed. This sale is to be closed on or before 30 business days after the date of signing of this agreement, unless the time of closing is extended by written agreement or by electronic media.

This is the entire contract between the Seller and Buyer, when accepted, and neither party shall be bound by any verbal representation altering the terms of this offer and agreement. The foregoing offer is made subject to acceptance in writing hereon by Seller within Ten ("10") days from and after this date, and the return of an executed copy to the undersigned.

This contract shall be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto. This contract, when accepted, may be assigned. This is a legally binding contract and the parties stipulate that they understand the terms and conditions of this agreement.

Seller accepts the foregoing offer and agrees to sell the above-described real property on the terms and conditions herein stated and for the agreed price.

R., Tab 13, Ex. 6.[1] The Fitzes signed these contracts in early June 2018.

[1] All record references are to the record of Case No. 120,896.

Although each brother was receiving royalties from existing production on the entirety of their 21.87474 acres, Red Stone subsequently discovered that the Fitzes did not apparently hold title to the full acreage. Part of the minerals were still titled in the name of their deceased uncle, Joe Jankowski (the Jankowski minerals) and part in the name of their deceased mother, Pauline Jankowski Fitz (the Pauline Fitz minerals). No probate had been conducted on either estate, although the brothers had obtained royalties from the Jankowski minerals via an affidavit of heirship, and they were apparently the sole heirs of Pauline Fitz's estate. Red Stone deemed the affidavit of heirship insufficient to confer title because it had not been recorded for ten years.[2]

Red Stone wrote to the Fitzes that "we will need to either probate both estates or do a quiet title. *We will perform all the curative work at no cost to the mineral owners.*" R., Doc. 12, Ex. 2 (emphasis supplied). The Fitzes agreed that Redstone would make efforts to clear title, but this would take more than thirty days. The parties agreed in late June 2018 that the Fitzes would convey their interests to Red Stone in return for a twenty percent down payment on the purchase price while Red Stone worked to clear title. The Fitzes provided the deed, and each apparently received twenty percent of the purchase price—$17,499.78—from Red Stone.

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[2] Title 16 O.S. § 67 provides that, after the date of death of a person who was an owner of a severed mineral interest in real estate, a person who claims the interest through an affidavit of death and heirship can acquire a valid and marketable title to the interest. Section 67(C)(4) requires, however, that the affidavit or the title transaction that contains the recital must have been recorded for at least ten years in the office of the county clerk in the county in which the real property is located before marketable title is established.

Some seven months passed without further word from Red Stone. On January 7, 2019, a representative of the Fitzes inquired to Red Stone: "Could I get an update on your progress please, the Fitz brothers are wondering." In response, on January 9, 2019, Red Stone's attorney wrote:

> I'm sorry this process has taken so long. I have been the only attorney in Red Stone's Oklahoma office for the past year, and as a result I have not had time to complete this yet. Our down payment was made based on a title landman's report. When I was doing the final title review to the quiet title, I noticed some issues in the early title that will require some research. (Specifically, I need to research some issues with early patents and the chains of title containing language stating only the surface are being conveyed.) I was then pulled off this project to work on other projects.
>
> Our owner knows this is my highest priority right now, so I am currently working on it. After I complete the research and final title review, I will let you know if we can proceed with a quiet title.

R., Doc. 23, Ex. 9.

In the early part of 2019, that same attorney followed up with the Fitz's representative:

> Just wanted to let you know that I have not forgotten about this. I am finishing up a couple of projects today, so I should be able to get back to the Fitz project tomorrow or on Wednesday. I having to reexamine all of the Fitz title because this title is complicated and the title landman's report was partially incorrect. I apologize again for the delays.

Id.

On June 19, 2019, however, Red Stone's attorney delivered this message:

> Thank you for your patience. I have completed reviewing this title, and unfortunately Red Stone will not be able to clear this title with a Quiet Title action and will not be moving forward with this transaction. Our initial analysis was based on a landman's report which

> was not completely accurate. I found a couple of issues in my title review.
>
> First, the Affidavit of Heirship for Joe Jankowski states that Joe died testate, but the Will has not been probated, the Affidavit then shows that Marlene Kasahara is the executor or administrator of the estate. It seems if the executor is known, the Will can be located and should be probated.
>
> Further, Red Stone does not acquire minerals from sellers who base their title on Affidavits of Heirship, which have been filed of record less than 10 years and appear to have been filed in lieu of probating a Will.
>
> Also the minerals in Lot 31 of Addition 5 are reserved by the United States in Patent.

Id. A few days after this letter, Red Stone quitclaimed its interests back to the Fitzes, and sent them these deeds, unsolicited.

In August 2019, Michael Fitz wrote back to a different Red Stone employee, who was described as "coming in this situation, new." R., Doc. 13, Ex. 11. Michael Fitz provided copies of the wills of his uncle Joe Jankowski and mother Pauline Jankowski Fitz. Michael stated that the brothers were the sole heirs of the Pauline Fitz estate. He also stated that Joe Jankowski's will did not specifically distribute his mineral interest but had apparently left this to the discretion of executrix Marlene Kasahara. *Id.* He stated that Marlene Kasahara had acquiesced and assisted in producing the affidavit of heirship to transfer the rights to Joe Jankowski's minerals in order to keep Joe and Pauline's interests together. Red Stone did not reply to this letter, apparently regarding its June 19th letter as a final repudiation of the contract. In December 2019, Marlene Kasahara, as executrix, quitclaimed Joe Jankowski's interest to the Fitzes.

In March 2020, each Fitz brother filed a separate suit against Red Stone alleging breach of contract and requesting specific performance. Red Stone answered and counterclaimed for the return of its down payments. The three suits were then consolidated. In August 2021, Red Stone filed a motion for summary judgment. The court denied this motion. In the same order, it found that Joe Jankowski's estate and executrix Marlene Kasahara were necessary parties and ordered the parties to attempt mediation.

Any mediation was evidently unsuccessful, and, in January 2022, the Fitzes filed another petition, this time including Joe Jankowski's estate, Pauline Fitz's estate and executrix Marlene Kasahara as additional plaintiffs. Red Stone filed a motion to dismiss, apparently arguing that, even if the court found the estates and executor to be "necessary parties" they were not *proper plaintiffs* because they had no contractual claims against Red Stone. The estates and executrix then filed dismissals without prejudice. The court denied Red Stone's motion to dismiss, but evidently no longer found the estates or the executrix to be necessary parties.

In June 2022, Red Stone filed a second motion for summary judgment. In November 2022, the court made a journal entry finding as follows. The Pauline Fitz minerals did belong to the Fitz brothers. The contract was a per-acre contract for $4,000 per deliverable acre, and the Fitzes collectively delivered half the 65.62422 acres contemplated. Hence, they were entitled to $131,248.44 from Red Stone, less the $52,496.34 that Red Stone had made as a down payment.

This equated to a net recovery of $78,752.10, split between the brothers as $26,247.87 each.

As far as the Jankowski minerals, the court found that these were not, in fact, "undistributed" in Jankowski's will, but were devised to Marlene Kasahara to use as she thought fit. As such, during the entire due diligence period of the contract, the Fitz brothers had no title to these minerals, and Red Stone was not therefore required to buy them.

Red Stone and the Fitzes both appeal this decision. The appeals were originally filed separately as Case No. 120,889 and 120,896 but were consolidated prior to assignment to this Court for decision.

II.

Summary judgment settles only questions of law. *Pickens v. Tulsa Metro. Ministry,* 1997 OK 152, ¶ 7, 951 P.2d 1079, 1082. The standard of review of questions of law is *de novo. Id.* Summary judgment will be affirmed only if the appellate court determines that there is no dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.* Summary judgment will be reversed if reasonable people might reach different conclusions from the undisputed material facts or a party is not entitled to judgment as a matter of law. *See Runyon v. Reid,* 1973 OK 25, ¶ 15, 510 P.2d 943, 946. All reasonable inferences are taken in favor of the nonmovant. *Jennings v. Badgett,* 2010 OK 7, ¶ 4, 230 P.3d 861, 864.

III.

A.

For its appeal, Red Stone argues that the court misinterpreted the contracts and should have granted its motion for summary judgment in full. Red Stone's argument is primarily that the contracts unambiguously required each Fitz brother to provide 21.87474 acres of mineral rights in the stated section. As the court found that each Fitz brother effectively owned only half this amount, they argued, the contract failed as a matter of law.

The trial court did not give the contract this rigid construction, however, and neither can we. We agree with the trial court's finding that the contracts at issue were less than clear as to whether the parties presupposed the sale of 21.87474 acres and nothing less, or the sale of an area "to be determined upon verification of title" at $4,000 per acre up to 21.87474 acres. The court held that each contract was for $4,000 per acre, with an anticipated 21.87474 acres, but the actual number of acres to be transferred, *up to* 21.87474, was to be determined by verification of title. Red Stone argues that the court improperly rewrote the parties' agreement.

The interpretation of a contract, and whether it is ambiguous is a matter of law for the Court to resolve. *Patel v. Tulsa Pain Consultants, Inc., P.C.*, 2022 OK 56, ¶ 9, 511 P.3d 1059, 1062. We find that two interpretations were possible here, and hence the court was correct to find an ambiguity. "The construction of an ambiguous contract is a question of law for the court where the ambiguity can be clarified by reference to other parts of the contract, or where the ambiguity

arises by reason of the language used and not because of extrinsic facts." *Paclawski v. Bristol Laboratories, Inc.*, 1967 OK 21, ¶ 24, 425 P.2d 452, 456; *Scungio v. Scungio*, 2012 OK 90, ¶ 18, 291 P.3d 616, 622.

We are not convinced that the answer lies entirely within this admittedly ambiguous clause, or that the Fitzes could have initially required Red Stone to purchase whatever quantity of minerals they might happen to own in Section 24-1N-10E. We do not, however, disagree with the trial court's rejection of Red Stone's theory that the contract was for exactly 21.87474 acres only.

Though the trial court's decision was based within the four corners of the contract, we may affirm on a different legal rationale. *Hall v. Geico Group, Inc.*, 2014 OK 22, ¶ 17, 324 P.3d 399. Summary relief issues are subject to *de novo* review in which this court's scrutiny of the entire record is pursued independently. *Myers v. Missouri Pac. R. Co.*, 2002 OK 60, ¶ 9, 52 P.3d 1014, 1019.

The contract required the sale to close on or before thirty business days after the date of signing of the agreement, unless the time of closing was extended. The contract makes repeated references to "verification" of mineral acres and gives Red Stone thirty days, or some expanded time upon agreement of the parties, in which to perform due diligence to ascertain title before closing. We agree that, if Red Stone found that the Fitzes did not have verifiable title to 21.87474 acres within the due-diligence period, it was not required to close on the contract, and *could* have rescinded its offer at this point in the negotiations.

The record is equally clear that, within the due diligence period, Red Stone discovered that the Fitzes did not appear to have sufficient legal title to the

identified minerals, but it did not rescind its offer. Instead, Red Stone offered to embark on legal proceedings to attempt to clear the Fitzes' title, making significant promises in the process. Red Stone also made a twenty percent down payment on the expected minerals and obtained mineral deeds from the Fitzes. This course of conduct by the parties demonstrates that the final agreement was to purchase whatever interest, up to 21.87474 acres, that could be cleared by Red Stone's promised title work. As such, we find no error in the trial court's decision that Red Stone was required to buy the Pauline Fitz minerals.

B.

The Fitzes counter-appeal the court's judgment that Red Stone was only required to purchase the Pauline Fitz minerals, and not the Jankowski minerals. The Fitzes argue that title to the Jankowski minerals could have been secured by routine work to clear title, which Red Stone had unambiguously promised but failed to undertake. While we entirely agree with the Fitzes' argument in this regard, we find that the trial court's entry of judgment in favor of the Fitzes was premature, for the following reasons.

First, we note that none of the Fitz brothers filed any motion for summary judgment below. While Rule 13 of the District Courts does permit a trial court to grant judgment to a non-moving party, *see* Okla. Dist. Ct. R. 13(e), we think such a judgment should be the exception and not the rule. Certainly, before entering an affirmative judgment for a non-moving party in summary judgment proceedings, the trial court should carefully review the record to ensure there are no material facts that are not agreed to.

In this case, the record reveals at least one unresolved material fact that is plainly apparent in the record. Namely, in Red Stone's attorney's June 19, 2019, letter to the Fitzes, the author claims that "the minerals in Lot 31 of Addition 5 are reserved by the United States in Patent." If this statement is true, even if the Fitzes are entitled as a matter of law to all the minerals in their mother's and uncle's estates, they would not have owned the full 21.87474, and thus cannot demand payment for the full acreage.

Second, it is not clear on this record that the Fitzes are entitled to the equitable remedy of specific performance, as opposed to damages. Equitable remedies are not available where there is an adequate remedy at law. *Krug v. Helmerich & Payne, Inc.*, 2013 OK 104, ¶ 34, 320 P.3d 1012, 1022, ("The long-standing rule in Oklahoma is that a plaintiff may not pursue an equitable remedy when the plaintiff has an adequate remedy at law.") Here, there has been no showing by the Fitzes that payment for breach will not make them whole, and thus, the trial court's order requiring specific performance was erroneous.[3] Whether specific performance is the appropriate remedy remains open on remand.

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[3] We recognize that the trial court did not use the phrase "specific performance" in its order. However, it did require Red Stone to pay the Fitzes what they would have, based on the trial court's calculation (which was erroneous, as detailed *below*), owed at closing had the deal gone through. We find this to be an order of specific performance. However, as either a measure of damages or an order of specific performance, the order is troubling because the Fitzes, after Red Stone's final set of quitclaim deeds, appear to be the record owners of the minerals in question. If specific performance is appropriate, the Fitzes cannot receive payment for minerals that they continue to hold title to. If damages are appropriate, both the value of the minerals and who actually ends up with title to the minerals at the conclusion of the litigation, are obviously both highly relevant questions.

Finally, we find that the trial court erred accepting Red Stone's argument that the Fitzes were not entitled to payment on any of the Jankowski minerals. Red Stone's behavior leading to this litigation was, at best, confusing. From the outset, Red Stone knew that the Fitzes had based their title to the Jankowski minerals on an affidavit of heirship. Nonetheless, Red Stone contracted to purchase those minerals, made a down payment on the same minerals, received deeds in return, and promised to "perform all the curative work at no cost to the mineral owners." Red Stone then delayed for approximately one year before announcing that "Red Stone does not acquire minerals from sellers who base their title on Affidavits of Heirship."

The district court found that Joe Jankowski's will left the distribution of the Jankowski minerals to the discretion of executrix Marlene Kasahara. The court reasoned that neither a quiet title nor a probate action could *require* Marlene Kasahara to transfer title to the Fitzes and hence "neither of these legal proceedings would have culminated in title being held by the Fitzes." The court therefore found that Red Stone was under no duty to attempt to clear title.

In so finding, the court inherently found that the Red Stone's duty was limited to attempting to clear title via a quiet title or probate action. The court evidently found that the duty did not include simply asking Marlene Kasahara if she would also sign a quitclaim to the Fitzes or even asking the Fitzes to obtain such a quitclaim. The record leaves little doubt that Ms. Kasahara would have done so if requested. In fact, in December 2019, Marlene Kasahara *did* quitclaim the minerals to the Fitzes.

Further, the record is clear that Red Stone did not rescind the agreements because it had attempted to clear title to the Jankowski minerals and failed, or because any attempt to clear title to the minerals would be futile. The company's June 19, 2019, letter made it clear that Red Stone was not prepared to do *any* work to clear title and would not purchase minerals "from sellers who base their title on Affidavits of Heirship, which have been filed of record less than 10 years," despite their promise to perform all the necessary curative work.[4] This position is entirely inconsistent with the prior twelve months of negotiations and agreements.

We find no significant difference between the situation of the Pauline Fitz minerals and the Jankowski minerals. In each case, based on the undisputed record, the title problems identified by Red Stone (with the possible exception of the patent defect discussed above) could have been resolved by work Red Stone promised to perform. The Fitzes contracted with Red Stone based on representations that Red Stone would make reasonable efforts to resolve title issues. Red Stone did not do so, and hence breached its agreement with the Fitzes.

Nevertheless, because the Fitzes have not yet sought any affirmative judgment, because the measure of damages is not clear, and because there are disputes of material fact that remain to be resolved, the trial court's judgment in

[4] Red Stone made no effort in its contract or negotiations to provide a narrow definition of "curative work." We find that making some effort to determine whether or not Ms. Kasahara—the Fitzes' aunt who had previously executed an affidavit of heirship that favored the Fitzes—was willing to convey her late-husband's interest to the Fitzes in a form acceptable to Red Stone was encompassed by the term.

favor of the Fitzes was premature. As such, that judgment is vacated, and the matter is remanded for further proceedings consistent with this opinion.

VACATED AND REMANDED

FISCHER, J., and HUBER, J., concur.

December 15, 2023